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1982

# Linda K. Larsen and State of Utah v. Douglas Collina : Brief of Respondents

Utah Supreme Court

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Steven L. Hansen; Attorney for Appellant;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

BEVERLY KERR,

Plaintiff and Respondent,

vs.

THOMAS ALDEN KERR,

Defendant and Appellant.

---

Case No. 18329

BRIEF OF APPELLANT

---

APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL  
DISTRICT COURT OF SALT LAKE COUNTY, THE  
HONORABLE ERNEST F. BALDWIN, JR., PRESIDING

---

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Plaintiff and Respondent

FILED

SEP 13 1982

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Clk's, Supreme Court, Utah

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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	:	
BEVERLY KERR,	:	
Plaintiff and Respondent,	:	
vs.	:	Case No. 18329
THOMAS ALDEN KERR,	:	
Defendant and Appellant.	:	

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BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is an action filed by Appellant to modify the original Decree of Divorce by reducing Appellant's alimony and child support obligations based on a material change of financial circumstances of either or both parties.

DISPOSITION IN LOWER COURT

After a hearing held on August 24, 1981 before The Honorable Ernest F. Baldwin, Jr., the Court denied Appellant's Petition for Modification and awarded Respondent a judgment of \$5,891.00 for back alimony.

## RELIEF SOUGHT ON APPEAL

Appellant seeks a review by this Court pursuant to its equitable powers and an Order of this Court reversing and vacating the judgment of the trial court and awarding Appellant a reduction of alimony and/or child support, to be applied retrospectively to the date the Petition for Modification was filed.

## STATEMENT OF FACTS

A Decree of Divorce was entered originally in this action in May, 1979, awarding Respondent the sum of \$799.00 per month alimony and \$450.00 per month child support for the parties' minor child Stephen.

In January, 1980, Appellant filed a Petition to reduce the alimony and child support awards based on a substantial reduction in Appellant's income from his dental practice. Subsequently, Appellant filed a supplemental petition alleging as an additional ground that Respondent had also experienced a substantial increase in her income through obtaining employment.

At the hearing held on August 24, 1981, Respondent testified she was unemployed in May, 1979, when the Decree was entered, relying at that time on alimony and child support, as well as interest and dividend earnings of approximately \$4,000.00 per year. (Tr. 9-11)

She further testified that since the Decree

was entered she had obtained employment with the Veterans' Administration in Salt Lake City at an annual salary rate of \$12,675.00. (Tr. 10)

Respondent conceded that the interest and dividend earnings she received to the date of the hearing in 1981 were \$4,688.03, (Tr. 13, Exh. 5-P), exceeding the sums she received at the time the original Decree was entered.

Through the date of the hearing, Respondent's earnings from employment for 1981 were a net of \$4,365.06 (Exh. 5-P), based on a thirty to thirty-five hour work week. Respondent testified that she could have worked a full forty hour work week but chose voluntarily not to do so. (Tr. 13-14)

Appellant then testified on direct examination that his net monthly income for the year prior to entry of the original Decree was \$3,257.58 per month. (Tr. 21-22, Exh. 4-D)

Appellant's net monthly earnings to date for 1981 were \$2,302.32, (Tr. 23-24, Exh. 3-D), reflecting a decline of nearly \$1,000.00 per month from Appellant's income at the time the Decree was entered.

Respondent then resumed the stand and testified as to her monthly living expenses for 1981. (Exh. 6-P)



The Court took under advisement a request by Appellant that any modification of alimony or child support be retroactive to the date that the Petition for Modification was filed.

Subsequently, the trial court found, in denying Appellant's Petition for a reduction, that there had been no change of circumstances as to either Appellant or Respondent and the Court awarded Respondent a judgment for back alimony in the sum of \$5,891.00.

### ARGUMENT

#### POINT I

#### THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT'S PETITION FOR MODIFICATION

The standard to be applied to a petition seeking a reduction of alimony or child support filed pursuant to Section 30-3-5, Utah Code Annotated (1953), as amended, is that the moving party must establish a substantial and material change of circumstances as to either or both of the parties. Such has been the standard from the early case of Cody v. Cody, 47 Utah 456, 154 P. 954 (1916) through a long line of authority to the present day.

It is also firmly established that this Court has a duty to review, under its equitable authority, all

of the evidence presented at trial on the question of modifying alimony or support and to make a determination de novo thereon. Hampton v. Hampton, 86 Utah 570, 47 P.2d 419 (1935)

In the present case, the unrebutted evidence at trial was that Appellant had experienced a substantial reduction in his net monthly income from the date the Decree was entered, amounting to nearly \$1,000.00 per month.

At the same time, Respondent had also experienced a substantial increase in her income based on her having obtained employment since the Decree was entered, and the fact that the interest and dividend earnings on her liquid assets had increased during the same period.

The only reason that Respondent's financial situation had not improved even more substantially was the fact that she voluntarily chose to work less than full time.

Under the facts as presented in the August 24, 1981 hearing it is inconceivable that the trial court should find no change of circumstance warranting a reduction of Appellant's alimony and support obligations. Appellant asserts that the trial court's findings and judgment constitute an abuse of discretion, although

Appellant asserts it is not necessary for this Court to so hold. Rather, this Court need only find that the trial court's ruling was inequitable, given all of the individual facts and circumstances of the case. Hampton v. Hampton, supra, at 47 P.2d 420.

Respondent asserted at the modification hearing that the original Decree contemplated an increase in Respondent's income and therefore precluded Appellant's request for modification, by a reference, in the trial court's original Memorandum Decision and Findings, to Respondent's need to supplement her income in order to continue to maintain her desired standard of living.

Appellant asserts that this contention is erroneous since the Decree could not take into account future changes in circumstances with a view to precluding modification. Such was the holding of the Supreme Court of Utah in the case of Ridge v. Ridge, 542 P.2d 189 (1975). In that case, this Court affirmed a reduction of alimony based on the decline in the husband's income comparable to Appellant's herein but reversed the portion of the trial court's Order which included future phased reductions. The Court found that such future reductions could be based only on circumstances as they might be established at some future hearing.

Consequently, the language of the original Decree cited by Respondent may not be relied on to defeat Appellant's Petition and the finding of the trial court with reference to this action for modification based on that provision was clearly erroneous.

Appellant asserts that the uncontroverted evidence presented at the modification hearing compels a reduction of Appellant's alimony and child support obligations. With reference to child support, since the parties' child has now attained his majority, any modification thereof could be retroactive only, since prospective child support is no longer at issue.

## POINT II

### APPELLANT IS ENTITLED TO A RETROACTIVE REDUCTION OF ALIMONY AND SUPPORT

One of the issues raised by Appellant at the hearing in this case was that any modification should have retroactive effect, at least as of the date Appellant filed the Petition for Modification.

The trial court took that contention under advisement pending submission of authorities by the parties. Subsequent thereto, the Court ruled that any modification would be prospective only and included in its conclusions that a reduction, if one had been granted,

would not have been retroactive.

Appellant concedes that the law in Utah presently is that alimony and support payments may not be modified retrospectively. Scott v. Scott, 19 Utah 2d 267, 430 P.2d 580 (1967)

However, Appellant urges that the preferred rule is that the Court should have discretion to make a modification retrospective to the time of filing a petition, as set forth by the Supreme Court of Washington in the case of Chase v. Chase, 444 P.2d 145 (1968).

In the present case, Respondent is a person with substantial personal wealth and obviously is capable of supporting herself. In view of the long-term decline in income from his dental practice, Appellant asserts it would be equitable for the Court to grant a modification retroactive to the date he filed his Petition.

Appellant respectfully urges the Court to adopt the standard set forth in Chase, supra, and to apply that rationale to his circumstances.

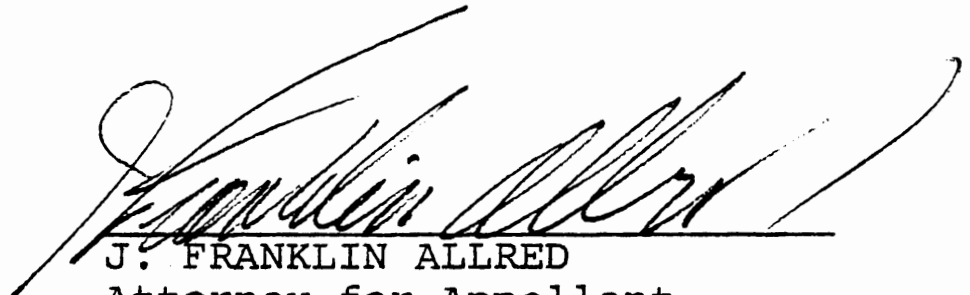
### CONCLUSION

Appellant respectfully requests this Court, after a full, equitable review of the evidence, to reverse and vacate the judgment of the trial court and to award him a reduction of alimony and child support,

making the same retroactive to the date of the filing  
of Appellant's Petition for Modification.

DATED this 10<sup>th</sup> day of September,

Respectfully submitted,



J. FRANKLIN ALLRED  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I have mailed, postage prepaid, two true and correct copies of the foregoing Brief of Appellant to:

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310 South Main Street, Suite 1200  
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this 10<sup>th</sup> day of September, 1982.

